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Supreme Court of the United States

October Term, 1972

No. 72-1264

MAYOR OF THE CITY OF PHILADELPHIA, et al.,
Petitioners

v.

EDUCATIONAL EQUALITY LEAGUE, et al.,
Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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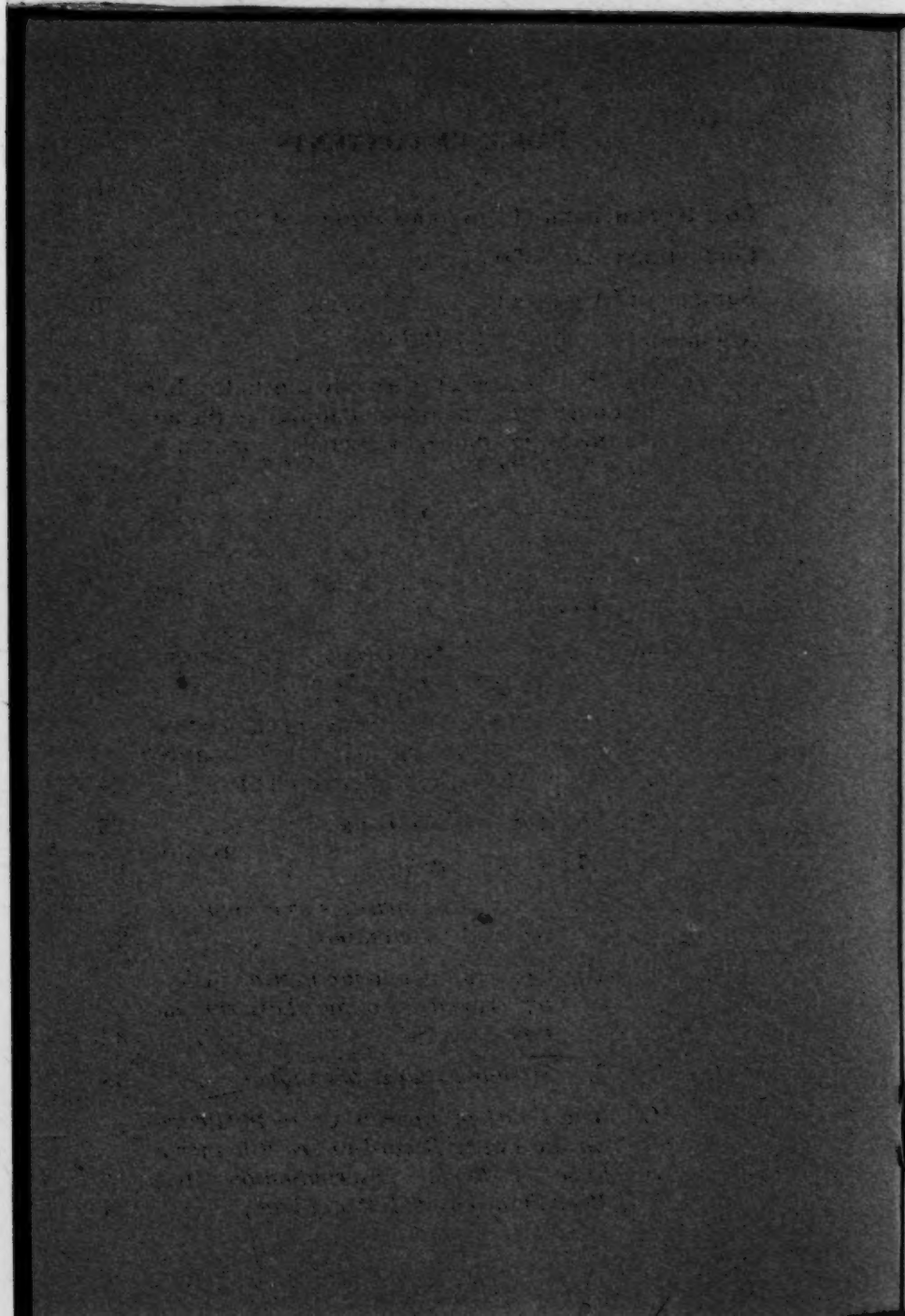

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was the Court of Appeals wrong in concluding that the process for selecting the Philadelphia School Board members, set forth in detail by the Philadelphia City Charter, must be free from racial discrimination in conformity to the Fourteenth Amendment, even though members of a Nominating Panel and of the Board itself are, under state law, appointed by the chief executive officer of a city?

II. Having so held, did the Court of Appeals err in ruling that evidence of ignorance of the existence of black organizations which would qualify for the Panel under state law, and statistical evidence demonstrating consistent under-representation of blacks on the Nominating Panel, in combination with the other consistent evidence presented by the respondents, made out a prima facie case of discrimination in the selection of the panels?

III. If an injunction against discrimination were proper, does the District Court have the power to enforce it against the successor in office of one of the original defendants, if the evidence shows that the successor follows the same procedures as resulted in the previously discriminatory conduct, absent a showing that the individual has committed new acts of discrimination against respondents' class since assuming office?

COUNTER-STATEMENT OF THE CASE

The Selection of School Board Members in Philadelphia

Prior to 1965, the members of the Philadelphia Board of Education were appointed by the Judges of the City's Court of Common Pleas.[1] In 1964, a Citizens' Commission was appointed by Mayor James H. J. Tate, (the original defendant in this case) pursuant to legislative authority granted by the Commonwealth of Pennsylvania,[2] to develop an educational supplement to the City's Home Rule Charter.[3] The basic purpose of the Commission was to establish an independent school board in the City of Philadelphia.[4]

Because independence of the school board was a basic goal, the Commission devoted a major part of its time to finding a method of selecting the school board. As its minutes show, over several months, the Commission, with input from citizen groups and consultants from the nationally known Fels Institute of Local and State Government at the University of Pennsylvania, considered various ways of selecting the school board to assure that it was both independent and representative of the Philadelphia community, and that the method of its selection was thoroughly democratic.[5]

In the course of the Commission's deliberations, several alternative methods of selection were suggested.

1. 24 P. S. Section 3-302 (1949).

2. 53 P. S. Sections 13201-13223 (1963).

3. Eight of the nine members of the Commission were white.

4. A legislative history of the Supplement, consisting of the minutes of the Commission and materials considered by it, was introduced into the record by defendants and marked as D-5 and D-7.

"D" refers to defendants' exhibits which are part of the record, but not part of any printed appendices; "P" refers to plaintiffs' similar exhibits; "AA" refers to Appellants' Appendix in the Court of Appeals; "Pet." refers to pages in the Petition for Certiorari; "J" refers to the Joint Appendix in this Court.

5. D-5 and D-7.

These ranged from popular election of the members of the school board on the one hand to simple appointment by the Mayor on the other. The minutes of the meetings disclose a search for a middle ground.[6] Thus, there soon developed general agreement on the nominating panel mechanism. The members of the Panel were to be high ranking officers of organizations broadly described in the Charter document. The alternative of naming the organizations was rejected so that the membership could change in response to changes in the community.[7]

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6. These minutes are part of the record.

7. The Educational Supplement to the Philadelphia Home Rule Charter, Section 12-206, provides:

Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employees organized and operated for the benefit of such workers and employees,
(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,
(3) a public school parent-teachers association,
(4) a community organization of citizens established for the purpose of improvement of public education,
(5) a federation, council, or other organization of non-partisan neighborhood or community organizations,
(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,
(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,
(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and
(9) a council, association, or other organization dedicated to

One after the other, the members of the Commission expressed their views on the necessity that the nominating panel be representative and responsive.[8] The Fels Institute pointed out to the Commission that the "panel is a device essentially for limiting the discretion of the appointing authority."[9]

The Chairman's final summary to the members of the Commission, shortly before final approval of the proposed Supplement by the Commission, stated:

> "The Panel, in effect, is and should be a substitute or counterpart of popular election. . . . It follows that the Panel's composition should be so arranged in the Charter that it can always constitute a balanced representation or cross section of the entire com-

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Note 7—(*Continued*)

community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Educational Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

8. Defendants' exhibits 5u and 5v, minutes of Commission meetings in November and December, 1964, record the Chairman, Mr. Nesbitt, Dr. Breslow, Dr. Zahn, Mr. Wolf, Mr. Goldman, Mrs. Anderson, and General LaBrum (then President of the School Board) all expressing the firm view that the Panel was the principal device for assuring the independence and responsiveness of the new School Board.

9. D-7(d), p. 5.

munity—all of the community's ethnic, racial, economic, or geographic elements and segments."[10]

The Supplement was approved by the voters of the City of Philadelphia on May 18, 1965. Shortly thereafter, pursuant to its terms, the Mayor of Philadelphia appointed the first thirteen members of the Educational Nominating Panel. Of these, ten were white, and three were black. The second Panel, appointed in 1967, consisted of eleven whites and two blacks. The third Panel, in 1969, consisted of twelve whites and one black. Finally, on May 28, 1971, Mayor Tate appointed the fourth Panel, consisting of twleve whites and one black.[11] The 1970 census found that approximately 34% of the city's population was black.[12]

As the legislative history entered in the record makes clear, the definitions in the Supplement were designed by the Commission to point to organizations existing at the time the Supplement was enacted; they were specifically written, however, in such a way as to assure responsive change over a period of time. Nonetheless, as a practical matter, the Mayor's office regarded the reappointment of the organizations which originally constituted the 1965 Panel to be a matter of routine.[13]

The Complaint in this Case

About two months after the 1971 Panel was appointed, and before it had made any nominations, a class action was brought by the Educational Equality League, by three black civic leaders and by two black school children on behalf of

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10. D-7(x), AA-15a.

11. J24a. Subsequently, it appeared that one of the white appointees to the 1971 Panel no longer was the chief executive officer of the organization he was selected to represent, and the correct person, a black, was appointed to the Panel.

12. *See, Educational Equality League v. Tate*, 333 F. Supp. 1202, 1203-4 (E.D.Pa. 1971), (Findings of Fact Nos. 1-8).

13. J53a, 61a, 70a, *et seq.*

all black citizens of Philadelphia.[14] The suit was brought under 28 U.S.C. Section 1343(3) alleging violation of the Fourteenth Amendment by the Mayor of Philadelphia, in that he discriminated on the basis of race in his appointments to the Educational Nominating Panel in 1971. The plaintiffs sought a judgment declaring that the Mayor had discriminated on the basis of race in the appointments, an injunction against the Panel as then constituted to prevent it from acting, as well as an order directing the Mayor to appoint a new Panel, one "that is fairly representative of the racial composition of the school community."[15]

Plaintiffs have never sought and do not now seek relief in the nature of mandamus directing the appointment of any particular number of blacks to the Panel.

The Evidence in this Case

At trial, the plaintiffs presented evidence relating to discrimination in the appointment of the Nominating Panel, as well as evidence showing a broad pattern of discrimination in public appointments and employment in Philadelphia.

First, plaintiffs showed the racial composition of the panels appointed by the Mayor in 1965, 1967, 1969, and 1971, along with the designation of the organizations which the individuals represented. This was compared to the population of the City of Philadelphia, which was approximately 34% black, and the population of the schools of Phila-

14. The Educational Equality League is a non-profit corporation which has been engaged for nearly forty years in pursuing equal educational opportunity for black children in the Philadelphia school system. One of the plaintiffs, Mr. Floyd Logan, is its President; the second civic leader was designated the Outstanding Young Leader of Philadelphia by the Junior Chamber of Commerce; the third civic leader is a member of the Pennsylvania Human Relations Commission. The suit was certified as a class action by the District Court. 333 F. Supp. 1202 (E.D.Pa. 1971).

15. Complaint, p. 8.

delphia, which was over 60% black.[16] Second, evidence was introduced showing that the Pennsylvania Human Relations Commission had found that the Philadelphia Schools were racially segregated in violation of the Pennsylvania Human Relations Act,[17] that the Philadelphia School Board was resisting orders by the Commission to redress the segregation,[18] and that there was a statistical pattern of racial imbalance in teaching and administrative positions in the school district.[19]

Third, plaintiffs introduced undisputed evidence showing patterns of appointments and employment by Mayor Tate.[20] This evidence showed that:

a. Tate had appointed 341 whites and 47 blacks (12%) to Boards and Commissions pursuant to the Home Rule Charter;[21]

b. Tate had appointed 83 whites and 9 blacks (9%) to civil service exempt positions with salaries in excess of $15,000 per year;

c. Civil service appointments to positions with salaries in excess of $15,000 a year, carried out under the supervision of the City Personnel Director, (responsible to the Mayor under the City Home Rule Charter) were 742 whites and 49 blacks (6%).[22]

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16. See footnote 12, *supra*.

17. P-1.

18. P-1, p. 12.

19. P-3.

20. J14a-23a, 122a.

21. Particularly noteworthy was the fact that Tate had appointed 62 whites and 6 blacks to Boards and Commissions related to education.

22. These patterns of under-representation of blacks are consistent with several court decisions issued in Philadelphia, at the instance of black citizens, to protect their rights under federal law. *Butcher v. Rizzo*, 317 F. Supp. 899 (E.D. Pa. 1970) (black plaintiffs granted relief against being used as fillers in lineups against their will); *Goode v. Tate*, Civ. A. No. 70-491 (E.D. Pa. 1973) (black plaintiffs granted relief for systematic misconduct by two

Finally, plaintiffs presented testimony by plaintiff W. Wilson Goode, who focused on several important areas:

Goode first listed organizations active in the black community which met the definitions in Section 12-206(b)

Note 22—(*Continued*)

policemen); *Alexander v. Rizzo*, Civ. A. No. 70-992 (E.D. Pa. 1973) (black plaintiffs obtained consent order against dragnet interrogations); *Commonwealth of Pennsylvania et al., v. O'Neill, et al.*, 348 F. Supp. 1084 (E.D. Pa. 1972) (black plaintiffs granted relief from racially discriminatory hiring practices in Philadelphia Police Department); *Black v. Rizzo*, Civ. A. No. 72-1781 (E.D. Pa. 1973) (black plaintiff granted relief from racially discriminatory employment practices in Philadelphia Fire Department); *Jackson v. Hendrick*, (Common Pleas), Civ. A. No. 72-2437 (1972) (black plaintiffs granted injunction against cruel and unusual punishment in Philadelphia city prisons); *Nicholson v. Pittenger*, Civ. A. No. 72-1596 (E.D. Pa. 1973) (order entered enjoining expenditure of $20 Million of federal funds for low income children by School District because of violation of federal guidelines designed to assure proper expenditure of funds); *Shannon v. H. U. D.*, 436 F.2d 809 (3rd Cir. 1970) (racial discrimination in violation of 1968 Civil Rights Act found in site selection of city planned federally subsidized housing); *Germantown Community Council v. H. U. D.*, Civ. A. No. 69-2426 (E.D. Pa. 1969) (preliminary injunction presently in force against construction of city planned highway which would isolate black community); *Washington Square West Project Area Committee v. H. U. D.*, Civ. A. No. 69-2972 (E.D. Pa. 1969) (preliminary injunction entered to prevent city Redevelopment Authority from using all-white citizens' group to evict black low income residents without construction of replacement housing); *Residents Advisory Board v. Philadelphia Housing Authority*, Civ. A. No. 72-2399 (E.D. Pa. 1972) (predominantly black plaintiffs successfully enjoined unfair tenants' election and in related case, prevented closing of day care center on basis of stipulation, Civ. A. No. 72-2098) (E.D. Pa. 1972); *Johnson v. Menna*, (Common Pleas), Civ. A. No. 663 (March Term 1973) (injunction issued on behalf of sole black candidate in special election to redraw voting instructions); *Brown v. Philadelphia Housing Authority*, Civ. A. No. 72-2083 (E.D. Pa. 1972) (temporary restraining order granted in class action on behalf of public housing residents threatened with mass evictions). *See also*, the numerous free speech decisions issued over the past several years: *Resistance v. Commissioners of Fairmount Park*, Civ. A. No. 69-819 (E.D. Pa.) (injunction issued to allow peace rally); *Leslie Tobin Imports v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa. 1969)

of the Supplement.[23] His testimony established that there were such organizations which met the definitions in seven of the nine categories. This testimony was uncontested and formed the basis of the Findings of Fact by the District Court.[24]

Goode further testified that the organizations appointed to the Panel in 1969 were changed from those previously appointed, and he explained the circumstances of the change.[25] He stated that, in early 1969, individuals active in the black community attempted to convince the Mayor to appoint an additional black to the School Board. According to Goode, when the 1967 Panel, which was still in operation at that time, made its recommendations to the Mayor for an existing vacancy, two of the three names submitted to the Mayor were blacks. Goode testified that the Mayor made a public statement that he was not going to appoint any more blacks to the Board of Education, and he characterized the Mayor's response to the nominees of the 1967 Panel as an angry one. Goode explained that soon thereafter the term of the 1967 Panel ended, and when the 1969 Panel was appointed, representatives of five new or-

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(injunction issued to prevent seizure of allegedly obscene material); *Hughes v. Rizzo*, 282 F.2d 881 (3rd Cir. 1968) (preliminary injunction upheld against roundups of "hippies"); *Peace, Inc. v. Philadelphia*, Civ. A. No. 70-2101 (E.D. Pa. 1970) (injunction issued to allow concert in Municipal Stadium); *Friends Peace Committee v. O'Neill*, Civ. A. No. 72-992 (E.D.Pa. 1972) (consent decree entered allowing demonstrations in public places); *Free Press, Inc. v. Rizzo*, Civ. A. No. 70-3175 (E.D.Pa. 1972) (preliminary injunction entered by consent not to interfere with reporters at public events); *Farber v. Rizzo*, Civ. A. No. 72-2052 (E.D.Pa. 1972) (injunction entered prohibiting interference with peaceful picketing of President; Police Chief presently in contempt for violation of order of Judge Huyett).

23. J33a-36a.

24. 333 F. Supp. at 1204.

25. J40a-41a.

ganizations were appointed to the Panel.[26] He was not cross-examined on any of this testimony, and defendants at no time either objected to his testimony or introduced any evidence which was related to it.

Plaintiffs presented the testimony of another black civic leader, and of several black students in the public schools and then rested.

At defendants' request, the case reconvened several days later, to allow them to present evidence.[27] Defendants' principal witness was Anthony Zecca, who testified that he had been deputy to the Mayor since 1963. Zecca stated that he had been asked as usual by the Mayor to prepare the list for the 1971 Panel. On cross-examination, Mr. Zecca admitted that he was unaware of the existence of the organizations active in the black community, described by Mr. Goode, which met the definitions in the Supplement, and therefore had not considered them for membership on the Panel. He also stated that reselection of the organizations previously on the Panel was "routine."[28]

Following Mr. Zecca's testimony, and the testimony of some members of the Educational Nominating Panel, the defendants called Clarence Farmer, the Chairman of the Philadelphia Commission on Human Relations, appointed by the Mayor. Mr. Farmer testified that approximately 41% of the employees in civil service positions in the City of Philadelphia were blacks, and that this was much higher than ten years previously.[29] Specifically, Mr. Farmer testified that "in the last four years, in the last ten years, there has been a tremendous mark of improvement among

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26. The fact that five new organizations were appointed, which was stipulated, was contrary to subsequent testimony by Deputy Mayor Zecca that reappointment of the organization was generally the normal course of events; he used the word "routine." J53a, 61a, 70a, *et seq.*

27. Defendants apparently had intended to present no testimony, but did so in response to a suggestion of the trial judge.

28. J53a, 61a, 70a, *et seq.*

29. J98a.

blacks, the representation that blacks have had in key positions in the City government, and I think that much of this can be attributed to Mayor Tate and his leadership of the City government."[30]

On cross-examination, Farmer was asked about a study done by the Commission on Human Relations of employment by race by the City government. Although Farmer acknowledged that such a study had been done under his direction, and initially promised to produce it since it was "public information,"[31] the City later interposed the defense of "confidentiality" and objected to its production. Nonetheless, the District Court directed that those parts of the study that were relevant to Mr. Farmer's testimony were to be made part of the record.[32]

The study concluded that, quite opposed to Mr. Farmer's testimony, "admirable as these goals might have been, they apparently have had the unfortunate effect of perpetuating results of past discrimination, so many of the departments have a black workforce with predominantly white superiors and administrative staff. . . . This general approach has been shortsighted and has contributed to the increasing economic gap between black and Puerto Rican citizens and a majority of white citizens."[33]

The District Court's Opinion in this Case

On the above record, the District Court issued its Opinion on November 8, 1971, several days after the election of Mayor Rizzo to succeed Mayor Tate, and before

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30. J100a.

31. J101a.

32. J2a. Order of October 1, 1971. Although by clerical oversight, none of the document itself actually appears in the record, it is referred to in pleadings, which are all part of the record, as well as respondents' brief in the Court of Appeals.

33. "City Employees Study," prepared by the Philadelphia Commission on Human Relations, p. 10 (Sept., 1970).

Mayor Tate had made any new appointments to the School Board.[34]

The District Court made findings concerning the appointments to the Nominating Panel set forth above, as well as to the population of the City of Philadelphia and the City's schools. The Court also made findings on the undisputed racial imbalance in appointments by the Mayor. Then, in particularly important findings, the Court concluded, in Finding No. 16, that "there are several organizations reflecting the views and participation of the black community which could qualify under subsections 1, 2, 3, 4, 5, 6, and 9 of Section 12-206(b), seven of the nine numerated classes." And, in Finding No. 17, the District Court found that Deputy Mayor Anthony Zecca "was unaware of the existence of many of these black organizations."[35] The Court also found that the Supplement itself had been violated in making the 1971 appointments.[36]

Despite these findings, the District Court dismissed the Complaint. The basis of its decision was that the broad numerical analysis frequently used in racial discrimination cases could not be applied to this case because the Educational Nominating Panel consisted only of thirteen people, and that this number was insufficient to render statistics meaningful as an indicator of racial discrimination.[37]

The Court also concluded that since plaintiffs could not prove their case by statistical evidence, in order to prevail, they had to show direct proof of intentional discrimination. The Court stated in its Opinion that the only direct proof offered by the plaintiffs was a newspaper article allegedly quoting the Mayor, which the Court dismissed as inadmissible hearsay.[38]

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34. Mayor Tate's 1971 appointments to the School Board were announced by press release on November 11, 1971.

35. 333 F. Supp. at 1204.

36. 333 F. Supp. at 1204.

37. 333 F. Supp. at 1206.

38. 333 F. Supp. at 1206. For reasons which were not stated, the Court also declined to exercise pendent jurisdiction over the

The Court of Appeals' Opinion in this Case

Plaintiffs immediately appealed to the United States Court of Appeals for the Third Circuit, which, on January 11, 1973, reversed the District Court.[39] The Court of Appeals explored the legislative history of the Supplement which was part of the record and reviewed all the testimony which had been presented.

In expressing its view of the case, the Court of Appeals first recognized that plaintiffs did not seek to establish any sort of racial quota for membership to the Panel, but asked only that the Mayor of Philadelphia not exclude blacks from proper consideration when making appointments to the Panel.[40] The Court then dealt summarily with the City's argument that the action of the Mayor in appointing the Nominating Panel was beyond the reach of the Fourteenth Amendment by stating that it was "clear from the language of the Educational Supplement and from the legislative history" that the Panel was not intended to operate as part of the staff of the Mayor.[41]

The Court of Appeals then considered the evidence to determine whether plaintiffs had successfully made out a prima facie case of discrimination against blacks. The Court articulated the classic rationale of the Fourteenth Amendment used by this Court in *Strauder v. West Virginia*, 100 U.S. 303, 307-8 (1880), reiterated recently in *Turner v. Fouche*, 396 U.S. 346 (1970) and *Alexander v. Louisiana*, 405 U.S. 625 (1972), and applied in the Third Circuit's own recent holding in *Smith v. Yeager*, 465 F.2d 272 (3rd Cir. 1972), *cert. denied, sub nom.* New Jersey v. Smith, 409 U.S. 1076 (1972).[42] This approach holds that

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case, even though it had found that there had been violations of the Supplement in several appointments. 333 F. Supp. at 1207.

39. The decision is reported at 472 F.2d 612.

40. 472 F.2d at 616.

41. 472 F.2d at 617.

42. The Court of Appeals noted that both *Alexander* and *Smith* had been decided after the District Court's decision in this case.

plaintiffs need not show a deliberate practice of discrimination but that they need only demonstrate that blacks were under-represented, and that there was an opportunity for racial discrimination. The Court also stated that ignorance of the existence of qualified black organizations on the part of the selector, in this case, Mr. Zecca, had considerable importance.[43]

The Court cited the findings filed by the District Court, which established that the opportunity for discrimination could not be denied, and that the person selecting the organizations was, in fact, ignorant of the existence of the black organizations, representatives of which could have been appointed under the terms of the Supplement. The Court concluded that the record as a whole, carefully analyzed, made out a prima facie case of discrimination, and the affirmations of good faith by Mr. Zecca and the members of the Nominating Panel were insufficient to rebut plaintiffs' case.[44] The Court of Appeals also noted that, contrary to the District Court's findings, Mr. Goode had testified "without contradiction or objection" about the circumstances of the appointment of the 1969 Panel.[45]

Finally, the Court stated that the precise nature of relief to which plaintiffs would be entitled was the responsibility of the District Court. The Court directed the District Court to issue a declaratory judgment in favor of plaintiffs, and also suggested that since, on the basis of the record before it at the time, Mr. Zecca continued as Deputy Mayor, an injunction to prevent future discrimination would be appropriate, even though Mayor Tate had been succeeded by Mayor Rizzo.[46]

Thereupon, the City sought a Petition for Certiorari, which was granted by this Court.[47]

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43. 472 F.2d at 617-18.
44. 472 F.2d at 618.
45. 472 F.2d at 616.
46. 472 F.2d at 618-19.
47. 93 S. Ct. 2149 (1973).

SUMMARY OF ARGUMENT

I. This is a case in which the chief executive officer of the City of Philadelphia has been found by the Court of Appeals for the Third Circuit to have engaged in racially discriminatory conduct in violation of the Fourteenth Amendment. This is not a case involving executive discretion. The Court of Appeals correctly found that Philadelphia had established a detailed mechanism, explained by an extensive legislative history, whereby a Nominating Panel was to perform a governmental function in participating in the selection process of the Philadelphia School Board. Because of the nature of the Panel, therefore, this Court need not reach the issue reserved in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), and decide whether and to what extent the federal courts can apply the requirements of the Equal Protection Clause of the Fourteenth Amendment to racial discrimination by a state executive acting pursuant to purely discretionary authority. Rather, this is a case, as the Court of Appeals correctly found, for the straightforward application of traditional legal principles used to determine whether racial discrimination had been proven. *Turner v. Fouche*, 396 U.S. 346 (1970); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Smith v. Yeager*, 465 F.2d 272 (3d Cir. 1972), *cert. den. sub. nom.* New Jersey v. Smith, 409 U.S. 1076 (1972).

II. The Court of Appeals correctly decided that it must examine the entire record in the case in order to determine as a matter of law whether a prima facie case of racial discrimination had been made out. Further, in concluding that respondents had proved such a case, the Court correctly relied on the fact that Mr. Zecca did not consider possible black appointments, and on the kind of indirect evidence which has uniformly been received by lower courts in cases involving racial discrimination, and which has specifically been approved by this Court in *Turner v. Fouche, supra; McDonnell-Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973);

and *Keyes v. School District No. 1, Denver, Colorado*, 93 S. Ct. 2686 (1973).

III. The Court of Appeals Opinion specifically held that it was the District Court's responsibility to determine the nature of injunctive relief. This Court need not consider whether the allegations in Petitioners' Brief that additional testimony regarding new duties of Mr. Zecca or a different approach to the appointing process by the new Mayor would eliminate the need for injunctive relief, since that matter will be determined by the District Court following the evidentiary hearing contemplated by the Opinion of the Court of Appeals. At that time, the District Court will exercise the broad discretion entrusted to it to deal with violations of the Fourteenth Amendment, *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971), in the light of the facts as it finds them to be at that time. Moreover, since the Mayor was sued in his official capacity, any injunction would automatically apply to his successor in office unless evidence were introduced to show that it should not, a result entirely consistent with the Court of Appeals' Opinion.

ARGUMENT

I. The Court of Appeals correctly concluded that the Fourteenth Amendment applied to the appointment of the Educational Nominating Panel by the Mayor.

The facts in this case do not involve the discretion of a chief executive to choose his personal staff, nor to make the broad range of patronage appointments normally available to an executive. This case involves carefully circumscribed decision-making by an executive pursuant to a comprehensive statutory mechansim for the selection of a school board, in which the executive failed to consider through ignorance the possibility of appointing qualified blacks. Racial discrimination in that decision making process is simply illegal.[48]

The Fourteenth Amendment provides:

> "No state shall deny to any person . . . the equal protection of the laws."

This Court is fully cognizant of the initial purpose of the Amendment: to provide a constitutional basis for Reconstruction legislation which was found to be necessary because of extensive evidence presented to the Congress that the Freedmen, emancipated by the Thirteenth Amendment, were suffering grievous disabilities at the hands of state and local officials. The Black Codes had saddled blacks with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value."[49]

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48. *Carter v. Jury Commission of Greene County*, 396 U.S. 326 (1970); *Turner v. Fouche, supra; Whitus v. Georgia*, 385 U.S. 547 (1967); *Lyons v. School Committee of the City of Boston*, Civ. A. No. 73-1150 (1st Cir. June 29, 1973); *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill., 1969).

49. *Slaughterhouse Cases*, 83 U.S. (16 Wall) 36, 70 (1873), cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426, (1968), and sources cited therein.

This Court recently stated, in a case involving the appointment process for school board members, that the Fourteenth Amendment created "a right to be considered for public service without the burden of discriminatory qualifications."[50] Thus, in the context of this case, the Fourteenth Amendment extended to the Freedmen, and to blacks today, the right to recourse to the federal courts, which are then bound to remove any remaining "badges of slavery" brought about by state action.[51] Although Philadelphia need not have chosen the Nominating Panel mechanism for selecting its School Board, "it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias."[52]

Petitioners seek to engraft an exception to that rule, an exception which would hold that a state executive retains an area of discretionary appointments which need not meet the generally accepted standards of the Equal Protection Clause. Whether such an exception is viable in the context of the Fourteenth Amendment will not be decided in the abstract, however, and because this case depends on its own particular factual situation, need not be decided here. The Mayor's appointment power here is clearly circumscribed by state law, and thus constitutionally invalid criteria cannot be superimposed thereon.[53]

A. *General Scope of the Fourteenth Amendment*

First, it is useful to recall certain precedents of this Court which set the guideposts for the inquiry in this case.

It is clear that a state "may act authoritatively through its executive as through its legislative body."[54] And, what-

50. *Turner v. Fouche*, *supra* at 362. *See also Carter v. Jury Commission of Greene Co.*, *supra* at 330.

51. *Jones v. Alfred H. Mayer Co.*, *supra* at 414.

52. *Carter v. Jury Commission of Greene County*, *supra*, at 330.

53. *Turner v. Fouche*, *supra* at 362-3.

54. *Lombard v. Louisiana*, 373 U.S. 267, 278 (1963). *See also, e.g., N.A.A.C.P. v. Thompson*, 357 F.2d 831 (5th Cir. 1966).

ever other purposes the Fourteenth Amendment might have had, its "central purpose . . . was to eliminate racial discrimination emanating from official sources in the States."[55]

This Court has also held, of course, that the Constitution will restrict the normally discretionary act of drawing municipal or legislative boundaries where the result is gerrymandering to disfranchise black voters and to prevent blacks from being elected to municipal office.[56] Even legislative matters may be within the ambit of the Fourteenth Amendment protection where racial discrimination is involved. This Court assumed in *Bond v. Floyd*, 385 U.S. 116, 130-131 (1966), that a state legislature may not exclude an otherwise qualified member because of his race and color.[57]

Effectuation of the Fourteenth Amendment's prohibitions against racial discrimination is also appropriate, of course, where the subject matter of the case is employment. Even though no person has a right to public employment, a state has no right to forbid employment to any person on account of race,[58] and such employment discrimination violates the Constitution and is actionable under the civil rights laws.[59] Nor may a state contract with employers known to discriminate.[60] A decision against Mayor Tate and Mayor Rizzo, among others, finding them responsible for discrimination on the basis of race in appointments to

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55. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

56. *White v. Regester*, 93 S. Ct. 2332 (1972); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

57. Cf. *Powell v. McCormack*, 395 U.S. 486 (1969).

58. *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714, 721 (1963).

59. *Todd v. Joint Apprenticeship Committee*, 223 F. Supp. 12 (N.D. Ill. 1963), *remanded with instructions to dismiss as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1964).

60. *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

the Philadelphia Police Department was recently affirmed *en banc* by the Court of Appeals for the Third Circuit.[61]

Nor can an executive deny *appointive* public office to any person or group of persons on account of his or their race or color. This Court has declared unconstitutional exclusion of blacks from jury services,[62] and discriminatory assignments of black teachers.[63] And, although highly discretionary, the discriminatory appointment of members of a local draft board has been judicially condemned.[64]

In fact, there is no case in this century in which this Court has held that proven racial discrimination by a state official does not violate the Fourteenth Amendment.

B. *The Educational Supplement to the Home Rule Charter*

The Educational Supplement created a very specific and narrow mechanism for choosing members of the Philadelphia School Board. It was based on extensive discussion by the Commission which drafted it, and subjected to intense public scrutiny. Moreover, the mechanism was intended to perform a representative and democratic function.

In establishing this mechansim, Philadelphia could not have barred black participation,[65] nor probably could

61. *Commonwealth of Pennsylvania, et al., v. O'Neill, et al.*, 473 F.2d 1029 (3rd Cir. 1973), *affirming in part, reversing in part*, 348 F. Supp. 1084 (E.D. Pa. 1972).

62. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

63. *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969); *Bradley v. School Board of the City of Richmond*, 382 U.S. 103 (1965); *see also, Clark v. Board of Education of the Little Rock District*, 426 F.2d 1035 (8th Cir. 1970); *Haney v. County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970).

64. *Clay v. United States*, 397 F.2d 901, 911 (5th Cir. 1968) (dictum), *vacated on other grounds sub nom.*, Giordano v. United States, 394 U.S. 310 (1969); *Sellers v. McNamara*, 398 F.2d 893, 895 (5th Cir. 1968) (sep. opinion of Judge Tuttle), *cert. denied, sub nom.*, Sellers v. Laird, 395 U.S. 950 (1969).

65. *Smith v. Allwright*, 321 U.S. 649 (1944).

it have designated black positions.[66] It is equally clear that Philadelphia cannot operate this mechanism in a racially discriminatory manner.

The Court of Appeals agreed with this analysis, based on its examination of the legislative history of the Supplement. The cases decided by this Court upon which the Court of Appeals relied were the jury cases, *Turner v. Fouche*, 396 U.S. 346 (1970), and *Alexander v. Louisiana*, 405 U.S. 625 (1972). The Court of Appeals observed that juries were required to be a cross-section of the community, and held that the Supplement required that the Nominating Panel was to be the same.[67] The language of the Chairman of the drafting Commission, to the effect that the Panel should function as a counterpart of popular election, recalls the language of the District Court on remand in *Turner v. Fouche:*

> "The selection of the school board members by the grand jury is tantamount to an election from the standpoint of political representation under a representative form of government." Civ. A. No. 1357 (S.D. Georgia, May 6, 1970) (unreported opinion, p. 2).

In fact, as the Court of Appeals found, the Panel plays a governmental role in the Philadelphia school system analogous to the grand jury in *Turner v. Fouche*. Since *Brown v. Board of Education*, 347 U.S. 483 (1954), there has been no place for racial discrimination in any part of a public school system.

Thus, not only does this case not involve discretion, but the facts found by the District Court, which showed that the mandates of the Supplement itself were violated, emphasize the extent to which the legislative intent was to have the selection process act as a mechansim of accountability in precisely the manner plaintiffs are urging.

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66. *See, e.g., Anderson v. Martin*, 375 U.S. 399 (1964).

67. *See Carter v. Jury Commission of Greene County, supra*, at 330, citing *Smith v. Texas*, 311 U.S. at 130.

If the Mayor is limited by the Supplement, in that he must satisfy the requirements of Section 12-206 in his appointments, there can be no possible reason to suggest that he is not circumscribed by the Fourteenth Amendment; since he has only limited discretion under state law, he can only have limited discretion under the Fourteenth Amendment. Moreover, the mandate to the Mayor, repeatedly emphasized through the legislative history, is to make the Panel representative of the community. The failure to meet that statutory objective by failing through ignorance even to consider eligible blacks, at least justifies the strict scrutiny usually given to situations of apparent racial bias violating the Fourteenth Amendment.[68]

C. *Carter v. Jury Commission of Greene County*

Of course, petitioners' arguments about separation of powers and the cases they cite are totally irrelevant to this case.[69] The soundness of the principle of executive and administrative discretion, and its insulation from judicial review as long as it is consistent with law, needs no defense or elaboration. It need only be noted in passing that the principle simply does not apply where allegations of racial discrimination have been made, or even to allegations of violations of due process. In such circumstances, a full examination of the merits of the constitutional claim is required, since no executive has the discretion to violate the Constitution which he has sworn to uphold.[70]

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68. *See Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966).

69. The citation in support of that proposition, *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45 (1971), is especially peculiar since, in that case, the Pennsylvania Supreme Court interfered in an unprecedented way with what had long been thought to be unreviewable executive discretion by ordering the Mayor of Philadelphia to provide funds for the operation of the Philadelphia courts.

70. *See, e.g., Dugan v. Rank*, 372 U.S. 609 (1963), *Greene v. McElroy*, 360 U.S. 474 (1959).

A somewhat different problem is raised, however, by *Carter v. Jury Commission of Greene County*, *supra*, decided the same day as *Turner v. Fouche*, *supra*. In that case, Mr. Justice Stewart, for the Court, suggested that there might be some problem in ordering the governor of a state to appoint a black jury commissioner. 396 U.S. at 338. Obviously, there are many basic problems of federalism to be resolved before such an order could be entered. *Carter*, however, was decided on the grounds that there was inadequate proof of discrimination and thus the question of remedy was not reached. But several aspects of *Carter* deserve comment here in support of the argument that it creates no impediment in this case either to a finding of discrimination or to an order invalidating the unconstitutional appointments.

First, the *Carter* opinion, and even Mr. Justice Black's concurrence, raised questions only about the extent of the *remedy* a federal court could impose if it found discrimination. There was no hint that a finding of a violation of the Fourteenth Amendment by the governor appointing the jury commission was beyond the power of the federal court, even though the Alabama Statute, pursuant to which the Governor acted, allowed him virtually total discretion in the appointments. See Ala. Code, Tit. 30, Section 9.

Second, the breadth of discretion in *Carter* emphasizes the inappropriateness of the Petitioners' argument in the context of a statute granting the Mayor only a narrow range of discretion. In this case, the statute does not create a cloak of discretion behind which the Mayor can hide to avoid a just claim under the Fourteenth Amendment.

Third, in *Carter*, plaintiff sought an order directing the appointment of a black jury commissioner. In the instant case, plaintiffs sought adherence to the mandate of the Equal Protection Clause and to the command of the Supplement itself that the community be adequately represented. Plaintiffs sought only a remedy conceptually granted by the District Court, and approved by this Court in *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971),

a process which remedied the equal protection violation. In actuality, of course, the remedy sought here is even less: a process from which racial discrimination is absent; the remedy sought here is not a specific proportion or number of blacks, as was ordered in *Swann*.

Finally, of course, *Carter* as actual precedent is inappropriate because it held that there was a complete absence of proof of discrimination.[71]

In summary, there is absolutely no precedent for the proposition that a state official has discretion to violate the Equal Protection Clause, particularly where he is operating pursuant to a mandatory statute, and where the evidence shows he did not take normal steps to assure proper consideration of appointment of blacks. The Court of Appeals was, therefore, correct in dismissing the argument out of hand. As for Petitioners' argument that plaintiffs have an adequate remedy at the ballot box, Judge Gibbons at oral argument in the Court of Appeals acknowledged the Madisonian source of the position, but observed, "it has not been the black experience in America."[72] And, of course, the entire line of Fourteenth Amendment cases stands also as a rebuttal.

II. The Court of Appeals correctly concluded that the entire record made out an unrebutted prima facie case of racial discrimination.

Once it had concluded that the Fourteenth Amendment applied to the appointment of the Nominating Panel, the Court of Appeals reviewed the Findings of Fact, and the entire record in the District Court, and concluded as a

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71. *See also, Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968) (dictum) *vacated on other grounds sub nom.* United States v. Giordano, 394 U.S. 310 (1969). Compare *White v. Regester, supra.*

72. *See also, United States v. Carolene Products Co.*, 304 U.S. 152, n.4 (1938); *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278, 1294 (1973).

matter of law that the record demonstrated an unrebutted prima facie case of racial discrimination. In so doing, it was carrying out its proper appellate function and it correctly applied well established legal standards.

A. *The Appellate Function*

The question of whether racial discrimination occurred in the appointment process of the Nominating Panel is, as Petitioners argue, the ultimate question of fact. But the reversal by the Court of Appeals of the District Court's finding of no discrimination was not in the nature of a disregard of a finding of fact, correctly barred by Rule 52(a). Rather, the determination by the Court of Appeals was a legal one: that is, the facts found by the District Court, as a matter of law, made out a prima facie case of racial discrimination. This legal judgment by the Court of Appeals was obviously within its competence, and in no way violated Rule 52(a).

In the earliest of the jury cases, *Norris v. Alabama*, 294 U.S. 587 (1935), this Court reviewed the facts as found by the lower courts and reversed the finding of no discrimination, holding that a claim of good faith was simply not a legal defense to proven discrimination. The Court of Appeals here performed the same function.

To call this judgment a factual one, as Petitioners do, and allege that it is in violation of Rule 52(a), is to ignore the subtle difficulties involved in questions of mixed law and fact, exploration of which is beloved of law schools, but thorough understanding of which has been reached by this Court, particularly in cases raising questions of Fourteenth Amendment violations. *Keyes* and numerous other cases make clear that it was not merely proper, but it was obligatory for the Court of Appeals to render a judgment on whether the facts in this case constituted a prima facie case of discrimination as a matter of law.

B. *The Legal Standard*

To the lay mind, and to state officials accused of racial discrimination, the charge almost invariably connotes intentional discrimination. But from the point of view of the victim, the intention of the official is almost invariably irrelevant. As Judge Wright, of the District of Columbia Circuit, wrote in *Hobson v. Hanson*, 269 F. Supp. 401 (D.C. 1967):

> "Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson v. Hansen, supra*, 269 F. Supp. at 497.

During the past twenty years, when federal courts have been repeatedly involved in cases charging racial discrimination, several common sense lines of inquiry have developed, particularly in the usual situation where the defendant does not admit disparate treatment on the basis of race. Two of these lines of inquiry were used by the Court of Appeals here: first, it agreed with the District Court that plaintiffs' initial obligation is to establish only a prima facie case, which may then be rebutted;[73] and, second, it held that the prima facie case may be made out

73. The propriety of this standard was reaffirmed this past term in *McDonnell-Douglas Corp. v. Green, supra*, and need not be discussed. *See also, Keyes v. School Dist. No. 1, Denver, Colo.*, 93 S. Ct. 2686 (1973).

by indirect proof: numerical disparities, opportunity for discrimination, and apparent similar patterns of conduct elsewhere. The second point deserves some exploration.

1. *Numerical disparities as evidence of racial discrimination*

The Court of Appeals evaluated the diminishing number of blacks on the Panel, and the increasing black population of the City of Philadelphia and its schools, and concluded on the basis of precedents of this Court that "the small proportion of blacks on the Panel points toward the possibility of discrimination."[74]

In cases involving racial discrimination, "statistics often tell much, and Courts listen."[75] Although this rule

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74. Pet. at 47. *See Turner v. Fouche, supra* at 359.

75. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962). *Accord: United States v. Greenwood Municipal Separate School District*, 406 F.2d 1086, 1092 (5th Cir. 1969). Statistics in this context means nothing more complicated than numbers and percentages; it does not refer to statistical theory as developed by mathematicians. *See* Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 80 Harv. L.Rev. 338 (1966). Traditional statistical theory applied to these factors, using the binomial theorem, would show that the chances in a random selection of finding one black out of thirteen Panel members are 20 to 1. The chances of finding two blacks are between 7 to 1 and 10 to 1. *See* Freund, *Mathematical Statistics*, 77-9; 156-60; 427 (2d Ed. 1971).

Petitioners have attempted to discredit the use of statistics here, Brief 26 *et seq.*, on the grounds that plaintiffs did not make a showing of statistical significance. This Court has never held that such a showing was required, and the Court of Appeals agreed. *Compare, Commonwealth of Pennsylvania, et al., v. O'Neill, et al.*, 473 F.2d 1029 (3rd Cir. 1973), where because the sole basis for its decision was a disparity which was not shown to be statistically significant, and because the Court of Appeals was confused by apparently contradictory assertions by the District Court in its opinion, a preliminary injunction issued by the District Court was vacated, 473 F.2d at 1031. Moreover, despite introducing testimony by a qualified statistician, the Petitioners have never contended

has primarily been confined to voting rights, employment, school desegregation and jury cases,[76] it has equal application in the instant case.

The Fifth Circuit said in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), *cert denied, sub nom*, Board of Education of the City of Bessemer v. United States, 389 U.S. 840 (1967):

> "This Court has frequently relied on percentages in jury exclusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes. Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white children in public schools." at 887. (Footnotes omitted.)[77]

The use of numerical imbalances as relevant indi-

Note 75—(*Continued*)
that the figures are not statistically significant in the technical sense.

Petitioners misrepresent *O'Neill*, where the Court of Appeals merely remanded to the District Court to make the judgment required by this Court in *Whitus*—that is, a non-technical examination of the likelihood that a particular result will come about by chance.

76. E.g., *Alabama v. United States*, *supra* (voting); *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969), *United States v. Local No. 86*, 443 F.2d 544 (9th Cir. 1971) (employment); *United States v. Greenwood Municipal Separate School District*, *supra* (schools); *Norris v. Alabama*, 294 U.S. 587 (1935) (juries).

77. *See also, United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959), *cert. denied*, 361 U.S. 838 (1959); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963).

cators of racial discrimination was approved by this Court recently in *McDonnell-Douglas Corp. v. Green*, *supra*. In that case, this Court set forth the proper burden of proof in an employment discrimination case, and specifically included numerical comparisons in the list of helpful evidence.[78]

In the light of the precedents, it is important to note that plaintiffs have never asserted, and the Court of Appeals did not hold, that the appointment of one or two blacks to a Panel of thirteen established by itself a prima facie case of racial discrimination. Those figures are only the initial signposts along the way. Plaintiffs in this case are no more entitled to a specific proportion of blacks on the Panel than teachers in a school system or students in a school.[79]

The District Court refused to consider the figures at all, and Petitioners here urge the same approach because of the smallness of the numbers involved. But this approach ignores both the reality of the tokenism of the small numbers—3, 2, 1, 1 out of 52 possibilities on four Panels—and the clear line of constitutional decisions relying on statistics.

The decisions in *Avery v. Georgia*, 345 U.S. 559 (1953), *Jones v. Georgia*, 389 U.S. 24 (1967), and *Sims v. Georgia*, 389 U.S. 404 (1967) indicate that it makes little difference that the size of the specific group from which blacks are allegedly excluded is relatively small, where the exclusion, as here, is repetitive. In those cases, petitioners successfully attacked, on the basis of statistics, the racial composition of jury panels having less than 25 persons. *See also, Turner v. Fouche*, *supra*.

Where class discrimination is charged in the use of the appointment power, the proper approach is for courts to look at the objective results to determine whether constitutional standards have been violated.[80] A statistical

78. *See* 93 St. Ct. at 1825.

79. *See United States v. Montgomery County Bd. of Education*, 395 U.S. 225, 236, (1969); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 24 (1971).

80. *Palmer v. Thompson*, 403 U.S. 217, 225, (1971); *Avery v.*

pattern from administrative decisions may enable a court to infer, without inquiring into the official motives, that an improper criterion has been used. Thus, the absence of black jurors from all juries in a state or county, despite the presence of qualified blacks within the jurisdiction, has been held to establish a prima facie case of racial discrimination in jury selection.[81]

Although the familiar application of the exclusion rule is in the context of *total* exclusion of Negroes over a period of years,[82] this Court has equally condemned (1) total exclusion from *specific* jury panels, even though other venires had Negro representation;[83] (2) *token* representation of minority group members;[84] (3) *disproportionate* representation of the minority community;[85] and (4) disproportionate *results* from the application of racially neutral standards.[86]

These cases are particularly relevant to plaintiffs' argument. For although one statistical theory does support the mathematical use of the figures here,[87] the raw numbers themselves are the most compelling: out of thirteen members of the Panel, 3 were black in 1965; 2 were black in 1967; 1 was black in 1969; and 1 was black in 1971. No matter how these numbers are twisted, no matter what case law is advanced, the reasonable mind must be compelled to shift the burden to the Mayor and seek an explanation, particularly in view of the black population of the City and the schools. The issue, as this Court said in *Turner v. Fouche*, *supra*, is whether the

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Note 80—*(Continued)*

Georgia, *supra*; *Hill v. Texas*, 316 U.S. 400 (1942); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966).

81. *E.g.*, *Smith v. Texas*, 311 U.S. 128 (1940).
82. *E.g.*, *Norris v. Alabama*, *supra*.
83. *Avery v. Georgia*, *supra*.
84. *Cassell v. Texas*, 339 U.S. 282 (1950).
85. *Jones v. Georgia*, *supra*; *Sims v. Georgia*, *supra*.
86. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
87. See footnote 75, *supra*.

racial distribution could have occurred by chance, or, as the Court said in *Keyes*, is "adventitious." 41 L. W. at 5007.

Moreover, the District Court and Petitioners appear to have misapplied another consideration: that of qualification. But in cases where racial discrimination is alleged, it is not necessary to determine how many members of the class qualify for the function in question. The legal standard for the existence of a prima facie case does not depend on the number of blacks found to be qualified to serve; it is only relevant that blacks comprise a substantial portion of the population, that *some* blacks are qualified to serve, and that few if any blacks have served in the past.[88]

In *Turner v. Fouche*, *supra*, this Court, applying the statistical rule, compared the percentage of blacks on the grand jury list (37%) to the entire black population of the county (60%). Georgia law in that case required that a grand juror be a registered voter, yet the Court did not look to determine the percentage of blacks who were registered voters, despite the general knowledge that blacks in the South generally do not register as frequently as whites. In that context, the *Turner* holding is particularly compelling, and clearly establishes the principle that the qualifications of the base population are irrelevant for the purposes of prima facie statistical proof of discrimination.

Petitioners nonetheless argue that the acceptance by the Court of Appeals of the numerical comparisons as "pointing toward the possibility of discrimination" violates Rule 52(a) of the Federal Rules of Civil Procedure in that it constitutes a substitution of appellate fact-finding for the fact-finding by the District Court. Apart from the fact that this specific issue was not raised by the Petition for Certiorari, this argument shows more clearly

88. *Hernandez v. Texas*, 347 U.S. 475 (1954). *See also*, *E.E.O.C. v. Plumbers Local No. 189*, 311 F. Supp. 468 (S.D. Ohio, 1970); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *United States v. Ironworkers, Local No. 86*, *supra*.

the misunderstanding of the law under which both Petitioners and the District Court were laboring.

To restate once again: the numerical comparisons in this case are not *determinative;* they are a relevant part of the entire picture, a picture which includes undisputed opportunity for discrimination and undisputed ignorance of eligible qualified blacks on the part of the person responsible for the selection of the Panel. The chief error of the District Court, and one which Petitioners urge this Court to repeat, was to take the individual elements of proof, examine each one in turn, and conclude, with regard to each one in turn, that it was insufficient to prove the case. The Court of Appeals, on the other hand, regarded the numbers only as a relevant part—but a significant part—of the picture. This was in accord with the law established by this Court. *Alexander v. Louisiana, supra; Turner v. Fouche, supra.*

There simply is no statistical "Plimsoll line" in the jurisprudence of this Court which proves discrimination. The issue, again to paraphrase Mr. Justice Frankfurter, is whether such an occurrence, in the context of all the evidence in the case, can be attributed "to mere fortuity."[89]

2. *Opportunity and ignorance of selector as evidence of racial discrimination*

The numerical disparities in this case are arresting, but as plaintiffs have consistently argued, and so the Court of Appeals found, other undisputed evidence was also in the record (and in the Findings of Fact) which support the inference of discrimination.

As the jury cases make clear,[90] ignorance of the

89. *Avery v. Georgia, supra,* at 564 (concurring opinion). *See also, Aeronca Mfg. Co. v. N.L.R.B.,* 385 F.2d 724, 272-8 (9th Cir. 1967).

90. *See Carter v. Jury Commission of Greene County, supra,* at 326.

black community by the jury commission is one of the most frequent reasons that blacks are not considered for jury service. In this case, the District Court found as a fact that "the person assigned by the Mayor of Philadelphia to choose the groups under the enumerated categories . . . was unaware of the existence of many of [the] black organizations [which qualify under the Supplement]."[91] Having made such a finding, however, the District Court proceeded to ignore it totally in its discussion of the case.

The Court of Appeals, on the other hand, recognized the ironic echo of the jury cases, and held that these findings were a relevant and significant part of the picture, since they supported the inference of discrimination, and contributed to the prima facie case.

Petitioners are apparently hard-put to deal with these Findings of Fact, and, despite having relied upon them in the Court of Appeals, argue in this Court that they are incorrect.[92] Not only does the undisputed testimony in the record rebut this argument but Petitioners obviously cannot attack the Findings at this stage of the case.

3. *Similar patterns of conduct*

The District Court found, on the basis of stipulated evidence, that certain patterns of low black participation emerged from an examination of Mayor Tate's appointment and employment patterns. The Court refused to consider that evidence, however, because it held that plaintiffs had not proven that blacks were qualified for the jobs. The Court of Appeals did not discuss the question. But since the Court of Appeals did reach the conclusion that the plaintiffs had made out a prima facie case on the basis of the *entire record*, and since it is this legal judgment that is in question here, this Court should consider the relevance of those Findings of the District Court.

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91. 333 F. Supp. at 1204.

92. Brief for Petitioners, at 41.

The most recent recognition by this Court of the relevance of this kind of evidence was in *Keyes v. School District No. 1, Denver, Colo.*,[93] the Denver school desegregation case. There, one of the questions was whether racial discrimination in one limited geographical part of a school district could be probative of discrimination throughout the district. The common sense conclusion, adopted by the Court, was affirmative.[94]

So in this case, it is obviously probative on the question of whether a prima facie case has been made out that the executive officer whose actions are alleged to be racially discriminatory has maintained a token level of black appointments and has pursued city personnel policies which have "contributed to the increasing economic gap between black and Puerto Rican citizens and a majority of white citizens."[95]

C. *The Court of Appeals Correctly Relied on the Entire Record to See Whether a Case of Racial Discrimination Had Been Shown as a Matter of Law.*

Petitioners' first point for certiorari to this Court attacked the Court of Appeals' reference to certain of plaintiffs' testimony as violative of Rule 52(a) of the Federal Rules of Civil Procedure. This attack is unfounded, and is merely an attempt to make up for an unfavorable record.

First, Petitioners seek to characterize the holding of the Court of Appeals as "manifestly unfair" to Mayor Tate.

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93. 93 S. Ct. 2686 (1973).

94. 93 S. Ct. at 2097. *See also, McDonnell-Douglas v. Green, supra; Aeronca Mfg. Co. v. N.L.R.B., supra; Marquez v. Omaha District Sales Office, Ford Div.*, 440 F.2d 1157 (8th Cir. 1971); *Granitville Co. v. E.E.O.C.*, 438 F.2d 32 (4th Cir. 1971); *Blue Bell Boots v. E.E.O.C.*, 418 F.2d 355 (6th Cir. 1969).

95. "City Employees Study," prepared by the Philadelphia Commission on Human Relations (Sept. 1970, p. 10).

To the contrary, the Court of Appeals was almost apologetic in its conclusion, and Judge Van Dusen, with characteristic graciousness, stated that the Court was "required to act on the basis of the record before it."

Second, Petitioners attack most directly the summary by the Court of Appeals of the testimony of plaintiff W. Wilson Goode regarding certain events of 1969 involving Mayor Tate, appointments to the School Board, and appointment of the 1969 Nominating Panel. The Court of Appeals commented on this testimony,[96] that, if it was true, an inference could be drawn regarding the appointment of the 1971 Panel, the one at issue in this case.[97] Later in its opinion, the Court of Appeals appears to have assumed that the testimony was true,[98] despite the absence of a Finding of Fact by the District Court on the question. Petitioners most strongly urge that this was reversible error. There are several reasons why consideration of this testimony by the Court of Appeals was proper.

To begin with the facts, the District Court had stated in its opinion that "the only direct proof offered by the plaintiffs was a newspaper article allegedly quoting Mayor Tate to the effect that he would not appoint any more blacks to the Board of Education."[99] Since Mr. Goode had, without question, testified to the same effect,[100] this statement was absolutely incorrect, and the Court of Appeals was undoubtedly aware of that fact. Moreover, the Court of Appeals was also able to determine that no objection had been interposed to Mr. Goode's testimony.[101] Finally, the Court of Appeals was able to

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96. J31a-50a.

97. 472 F.2d at 616, n.9.

98. 472 F.2d at 618, n.16a.

99. 333 F. Supp. at 1206.

100. J40a-41a.

101. Petitioners appear to assume, even though there is no basis for the assumption in the record, that Mr. Goode's testimony was based on the newspaper article. Brief for Petitioners, p. 37.

place Mr. Goode's testimony and Mr. Zecca's testimony side-by-side and conclude that Mr. Goode's testimony was, in fact, uncontradicted. For Mr. Zecca, when asked about 1969, repeatedly stated that he did not recall the events:

> Q. Mr. Zecca, do you recall the controversy over the appointment of a successor to Mr. Goldman on the School Board?
>
> A. No, I don't.[102]

And later, after showing Mr. Zecca the copy of the newspaper article, the authenticity of which was never questioned:

> Q. You don't recall, however, this having happened?
> A. No.[103]

The issue before this Court is, given the above facts, and the fact that Petitioners did not present any testimony which tended to cast any doubt on Mr. Goode's version of the incident, was the Court of Appeals correct in regarding Mr. Goode's testimony as part of the overall picture?

First, the District Court's conclusion of fact was clearly erroneous, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in that the Court of Appeals must have had "the definite and firm conviction that a mistake had been committed," in stating, in effect, that Mr. Goode had not testified at all concerning the events of 1969. Moreover, since the error consisted in ignoring

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Note 101—(*Continued*)

Mr. Goode would have testified, had he been cross-examined, or had an objection been raised, that his testimony was based on his hearing and seeing the Mayor make the statements in question on a television program. It is somewhat peculiar that, in a Brief full of assertions of facts that are *dehors* the record, Petitioners nowhere deny the truth of Mr. Goode's account of the 1969 events.

102. J66a.

103. J93a.

certain testimony, the Court of Appeals was justified in examining it, as it might not have been had the District Court held that it did not believe Mr. Goode.

Second, the District Court made no finding at all on the question of whether the Mayor did, in fact, make the statement, and, as noted, Petitioners have not to this day addressed themselves to it. Thus, the Court of Appeals did not set aside any Findings of Fact within the meaning of Rule 52(a), but merely supplemented the Findings from obvious uncontradicted evidence in the record.

Third, in a case raising constitutional questions, appellate courts have greater leeway to review the entire record, including matters not specifically passed on by the District Court, to determine whether the Constitution has been violated. See *Jacobellus v. Ohio*, 378 U.S. 184, 189 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *See also, Guzick v. Drebus*, 431 F.2d 594, 599 (6th Cir. 1970), *cert denied*, 401 U.S. 948 (1971); *Cousins v. City Council of City of Chicago*, 466 F.2d 830 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1972).

Fourth, the Court of Appeals used Mr. Goode's testimony only as a basis for drawing a consistent inference of discrimination; that testimony did not constitute a major basis for the Court's decision, but was merely regarded as one of the numerous elements in the record which were consistent with a prima facie case of racial discrimination. Petitioners had ample opportunity to rebut both the specifics and the import of the evidence, and failed to do so.

III. The Court of Appeals dealt correctly with the scope of relief to be afforded on remand.

The Court of Appeals' principal direction for the District Court on remand was that it was the lower court's "function to determine the precise nature of the relief to which plaintiffs are entitled."[104] The Court of Appeals

104. 472 F.2d at 618.

went on, however, to articulate some of the principal items which the lower court should consider on remand. It is in that discussion that Petitioners assign error, because the appeals court stated that the lower court should enjoin the present Mayor from discriminating in regard to the 1973 or future Panels. Petitioners argue that since no fault has been assigned to Mayor Rizzo, it was error for the Court of Appeals to order relief against him.

This contention can be answered briefly. First, the record before the Court of Appeals, as the Court took pains to point out in footnote 21, Pet. 49, 472 F.2d at 619, showed that Mr. Zecca was Deputy Mayor, and was ignorant of black organizations. Moreover, he regarded reappointment of the organizations previously serving on the Panel as routine. Unless the defendants can show that these facts are no longer true, then prospective relief will obviously be required to prevent future violations of the Fourteenth Amendment, for "equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid."[105]

Petitioners have asserted that the facts assumed by the Court of Appeals are not true.[106] If that is so, and if the process of appointing the Panel is now free from the taints found by the Court of Appeals, then prospective relief will not be necessary. This is a question, as the Court of Appeals stated, to be resolved by the District Court on remand. Plaintiffs recognize that if the facts are sufficiently changed, they might not be entitled to every detail of the relief described by the Court of Appeals.

On the other hand, the class of black citizens of Philadelphia, according to the Court of Appeals, have established that their rights under the Fourteenth Amendment have been violated by the chief executive officer of the city acting in his official capacity. Regardless of the fact that Mayor Tate has been succeeded by Mayor Rizzo,

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105. *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

106. Brief for Petitioners, p. 50.

plaintiffs are entitled to judicial assurance that such violations will not continue. To argue this does not reflect on Mayor Rizzo,[107] but is only the traditional measure of protection offered to prevailing plaintiffs by the federal courts. The District Court has

> "not merely the power but the duty to render a decree which [will] . . . so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

The opinion of the Court of Appeals obviously contemplated an evidentiary hearing on remand. Prior to that time, appropriate defendants may be substituted and discovery engaged in. Thereupon, plaintiffs will be able to determine the precise nature of the relief they will seek from the District Court. Plaintiffs may conclude that under the circumstances only declaratory relief is needed; they may seek only removal of the school board members appointed as a result of the deliberations of the 1971 Panel;[108] they might seek relief regarding the 1973 Panel which has been appointed, and has made its nominations; or they might seek prospective relief against a system of appointing the Panel which has been held by the Court of Appeals to have violated their Fourteenth Amendment rights, if that same system appears to be operative under the administration of the present Mayor.

Plaintiffs recognize, however, that, as stated by the Court of Appeals, the precise nature of the relief they will receive will be decided by the District Court, in accor-

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107. *But see* footnote 22, *supra*.

108. This would have no effect on previous actions taken by the members of the Board, even if they had been illegally appointed. *Commonwealth ex rel. Palerno v. Pittsburgh*, 339 Pa. 173, 13 A.2d 24 (1940); *Huber v. Pennsylvania Human Relations Commission*, 43 D. & C. 2d 437 (C. P. Dauphin Cty., 1967); *United States ex rel. Watkins v. Commonwealth of Pennsylvania*, 214 F. Supp. 913 (W.D. Pa. 1963).

dance with general principles, such as those set forth by this Court in *Swann, supra*, at 28.

In view of the above, it is clear that the Court of Appeals did not err when it suggested that prospective relief would be appropriate on remand. In any event, if at some time in the future, there is an Order about which Petitioners take umbrage, the time to object to it will occur. At this time, there is no Order for this Court to review, and thus no action is needed.

CONCLUSION

For the reasons above stated respondents respectfully urge this Court to affirm the judgment of the Court of Appeals, thereby remanding the case to the District Court for the Eastern District of Pennsylvania for evidentiary hearings and the entry of appropriate relief.

Respectfully submitted,

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